CITATION: Ontario v. Lipsitz, 2011 ONCA 466
DATE: 20110622
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COURT OF APPEAL FOR ONTARIO

O'Connor A.C.J.O., Laskin and MacPherson JJ.A.

BETWEEN

Her Majesty the Queen in Right of the Province of Ontario, College of Physicians and Surgeons of Ontario, Dr. John Fleetham, Caroline Kemp, Dr. Daniel Klass, Dr. Michael Fitzpatrick, Sandra Halko, Dr. Rocco Gerace, Karen Stanley, Marsha Barnes, Dr. Mohamed R. Goolam Hussain, Lori Davis, Tracey Marshall, Jeff Morgenstern, and Bruce Kirton

Defendants (Appellants/
Respondents by way of cross-appeal)

and

Dr. Jeffrey Lipsitz, Sleep Disorders Centre of Metropolitan Toronto Inc., Sleep Disorders Centre – Ottawa Inc., and Sleep Clinic Network of Ontario Inc.

Plaintiffs (Respondents/Appellants
by way of cross-appeal)

Michelle Gibbs, for the appellants College of Physicians and Surgeons et al.

Kim Twohig and Lise Favreau, for the appellants Her Majesty the Queen in Right of Ontario et al.

Neil M. Abramson and Marco Falco, for the respondents

Heard: March 28, 2011

On appeal from the order of Justice E. Belobaba of the Superior Court of Justice, dated

October 20, 2009.

O'Connor A.C.J.O.:

[1] The two main issues on these appeals[1] are: (1) whether the underlying action should be dismissed because the appellants (defendants) are immune from suit under s. 38.1 of the *Independent Health Facilities Act*, R.S.O. c.I.3 (the "*IHFA*") and (2) whether the underlying action should be stayed as an abuse of process.

Facts

[2] From approximately 1987 to December 2006, Dr. Lipsitz and his associated companies ("Dr. Lipsitz") operated a network of independent health facilities, which specialized in treating sleep disorders.

[3] In 1998, the province amended the *IHFA* to include sleep study facilities. Those facilities already operating were grandparented for one year during which time the operators could continue to operate and apply for licences under the new legislative regime. In order to obtain a licence, an operator was required to show that the facility conformed to certain quality standards.

[1] These reasons address two appeals, C51330 and C51287. The appeals are from decisions on motions that were heard together. The motion judge issued one endorsement addressing both.

[4] The *IHFA* contains the regulatory scheme under which the Director, appointed under the *Act*, is responsible for making decisions in relation to the licensing and operation of independent health facilities in Ontario. The Director has the authority to issue or refuse to issue licences to operate and to impose conditions on licences. The Director also has the authority to suspend, revoke or refuse to renew a licence and to amend the conditions of a licence.

[5] The Director's decisions are directed at ensuring that independent health facilities are operated in accordance with appropriate standards and in a manner not prejudicial to the health, safety and welfare of any person.

[6] Pursuant to the *IHFA*, the Director may request that the Registrar of the College of Physicians and Surgeons of Ontario (the "CPSO") appoint individuals to conduct inspections or assessments of the quality and standards of services provided by an independent health facility.

[7] Facility operators who are dissatisfied with the decisions or proposed decisions of the Director have a right of appeal to the Health Services Appeal and Review Board ("HSARB") and from there to the Divisional Court on a question of law.

[8] In June 1999, Dr. Lipsitz applied for licences for the 12 sleep disorder centres he was operating at that time.

[9] The Director asked the CPSO to conduct pre-licensing inspections and assessments of seven of the centres. Those inspections triggered what turned out to be a

series of disputes between Dr. Lipsitz on the one hand and the Director and the CPSO on the other. The essential aspects of these disputes followed a pattern and for the purposes of these appeals, need only be briefly summarized.

[10] Over the years following Dr. Lipsitz's initial applications for licences, the CPSO, at the request of the Director, carried out a number of inspections and assessments of Dr. Lipsitz's centres. On several occasions, the CPSO advised the Director that Dr. Lipsitz's centres were not being operated in accordance with appropriate standards and in some instances that they presented a risk to the health, safety and welfare of persons. On receiving the reports, the Directors[2] notified Dr. Lipsitz that they proposed to suspend or revoke Dr. Lipsitz's licences to operate or to take other regulatory action such as requiring certain terms to be complied with as a condition of issuing of a licence.

[11] In each instance, Dr. Lipsitz immediately appealed the Director's decision or proposed decision to the HSARB. Pending the appeals, the Director permitted Dr. Lipsitz to continue to operate in accordance with specified standards. Before any of the appeals were heard by the HSARB, Dr. Lipsitz entered into Minutes of Settlement with the Director and the CPSO on terms and conditions that permitted him to continue to operate or to transfer operating licences to others. In each case, Dr. Lipsitz consented to an order of the HSARB dismissing his appeal.

[12] In 2007, Dr. Lipsitz decided to transfer the licences for the remaining centres he was then operating. The Director agreed to the transfers.

[2] There were two Directors during the relevant period.

Dr. Lipsitz's Action

[13] In 2008, Dr. Lipsitz commenced the action that underlies these appeals. In his action, he sued two categories of defendants: 1) the Ontario defendants, i.e. the Ontario Crown, two individuals who were Directors under the *IHFA* during the relevant time period, and two others who were managers of the Independent Health Facility Program (the "Ontario appellants"); and 2) the College defendants, i.e. the CPSO and nine individuals who were College employees or appointees and were involved in the inspections and assessments of Dr. Lipsitz's centres (the "College appellants").

[14] Dr. Lipsitz's statement of claim is based on the intentional torts of conspiracy, intentional interference with economic relations, abuse of public office, and abuse of process. Throughout, he alleges bad faith on the part of the appellants.

[15] In his statement of claim, Dr. Lipsitz alleges that from 2001 to 2007, the appellants engaged in a "closure campaign". As part of that campaign, they routinely engaged in excessive and unreasonable investigations and assessments and took reckless and unjustified steps to close his sleep disorder centres. This improper conduct required him to operate the centres under unreasonable and expensive restrictions designed to make it impossible for him to continue.

[16] As a result of the appellants' actions, Dr. Lipsitz agreed to onerous undertakings in order to allow him to continue to operate. Ultimately, after having been harassed and

intimidated, Dr. Lipsitz was forced to close or sell all of his sleep disorder centres. He was forced to sell at "fire sale" prices.

[17] Dr. Lipsitz also alleges that as part of the closure campaign the CPSO improperly initiated investigations of his professional conduct under s. 75(a) of the *Health Professions Procedural Code*.[3]

[18] Dr. Lipsitz pleads that the appellants' closure campaign resulted from the appellants' desire to restrict the growth of his business, to minimize government spending and to diminish the relatively large amount of billings which his centres realized on an annual basis.

The Motion

[19] After filing their statements of defence, the appellants moved to dismiss Dr. Lipsitz's action or to strike his statement of claim under Rules 20, 21.01(3)(d), and 25.11 of the *Rules of Civil Procedure.*

[20] The grounds of the motion included the following: 1) Dr. Lipsitz's claim for compensation is barred by s. 38.1 of the *IHFA*, which grants the appellants immunity from paying compensation; 2) the claim is an abuse of process because it is a collateral attack on the administrative proceedings for resolving licensing issues under the *IHFA*; 3) the claim is an abuse of process because Dr. Lipsitz is seeking to re-litigate issues that

[3] The *Health Professions Procedural Code* is found in Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O 1991, c. 18.

were or should have been disposed of in Dr. Lipsitz's appeals to the HSARB; 4) Dr. Lipsitz's allegation about the CPSO's investigations pursuant to s. 75(a) of the *Health Professions Procedural Code* should be struck pursuant to s. 36(3) of the *Regulated Health Professions Act, 1991*; and 5) Dr. Lipsitz's statement of claim does not disclose a reasonable cause of action.

[21] The motion judge dismissed the appellants' motion with the exception of the fourth issue listed in the preceding paragraph. The motion judge struck those portions of Dr. Lipsitz's claim relating to the CPSO's investigations of Dr. Lipsitz's professional conduct.

[22] I will refer to the motion judge's reasons in more detail in my discussion of the issues.

Issues

[23] Dr. Lipsitz raises a preliminary issue on these appeals. He argues that these appeals should be dismissed because the appellants raised the same arguments on a motion for leave to appeal to the Divisional Court and were denied leave.

[24] The appellants' grounds of appeal can conveniently be addressed in the following manner. The appellants argue that the motion judge erred in failing to find that:

a) they are entitled to immunity under s. 38.1 of the *IHFA*;

b) Dr. Lipsitz's claim is an abuse of process because it seeks to re-litigate issues finally determined in the regulatory process; it is a collateral attack

> on the orders made in the regulatory process; and the regulatory process under the *IHFA* has exclusive jurisdiction over the matters raised in Dr. Lipsitz's claim.

[25] Dr. Lipsitz cross-appeals the motion judge's order striking the portions of his statement of claim that relate to the CPSO's investigation under s. 75(a) of the *Health Profession Procedural Code*.

Dr. Lipsitz's Preliminary Argument

[26] Dr. Lipsitz argues that the appeals should be dismissed because the appellants were denied leave to appeal to the Divisional Court based on the same grounds they now seek to advance in this court. In particular, Dr. Lipsitz refers to the appellants' arguments with respect to immunity under s. 38.1 of the *IHFA* and abuse of process.

[27] Dr. Lipsitz argues that the doctrines of abuse of process, issue estoppel, *res judicata* and collateral attack operate to preclude this court from rehearing the same issues that they argued on the leave motion to the Divisional Court. As part of this argument, he submits that the motion judge's orders with respect to immunity and abuse of process were interlocutory and, therefore, appealable to the Divisional Court with leave and not to this court.

[28] I do not accept these arguments. In my view, the motion judge's orders with respect to immunity and the abuse of process issues were final in nature and as such are

properly appealable to this court. Moreover, I am satisfied that the appellants took that position on the argument of the motions for leave to appeal to the Divisional Court.

[29] In their notices of motion seeking leave to appeal to the Divisional Court, the appellants raised the immunity and abuse of process issues. However, contemporaneously, they also filed notices of appeal to this Court raising the same issues. Apparently, at that point, they were uncertain as to the proper route of appeal.

[30] In their facta on the leave motions to the Divisional Court or in oral argument, the appellants took the position that the motion judge's orders with respect to the two issues, immunity and abuse of process, were final orders and, therefore, properly appealable to this court.

[31] In para. 38 of their factum on the motion at the Divisional Court, the Ontario appellants set out their position as follows:

> In this case, it is the position of the Ontario defendants that the motion judge's order in respect of the issues of statutory immunity and abuse of process is final as the decision appears to preclude the Ontario Defendants from raising these defences at the trial of the action. A separate appeal to the Court of Appeal for Ontario has therefore been launched on these aspects of the motion judge's decision. In the event that the court does not consider these issues to have been finally decided, the Ontario defendants wish to argue that leave to appeal should also be granted on these aspects of the order.

[32] The Ontario appellants set out the authorities in support of their position that the orders were final.

[33] Before the Divisional Court, the College appellants took essentially the same position as the Ontario appellants. After setting out some arguments with respect to the applicability of s. 38.1 as a defence to the claims against them, they concluded in para. 27 of their factum by saying:

> The College Defendants submit that some of the findings and conclusions of the motions judge in relation to s. 38.1 of the *IHFA* may be '"final", giving rise to an automatic right of appeal to the Court of Appeal. However, the fact that the motions judge also found there to be genuine issues for trial as to which aspects of the claim are barred by s. 38.1 of the *IHFA* and which aspects are not, may be found by this honourable court to be "interlocutory", in which case, the College Defendants respectively seek leave to appeal in regards to these issues as well.

[34] Neither set of appellants included abuse of process arguments in their factum.

[35] In their motions for leave to the Divisional Court, the appellants raised one issue that all parties accepted was interlocutory; namely, whether the motion judge erred in finding that the amended statement of claim disclosed a reasonable cause of action.

[36] The leave judge dismissed the appellants' motions for leave. She agreed with the motion judge that the statement of claim disclosed a reasonable cause of action. She also addressed and agreed with the motion judge's conclusions with respect to s. 38.1 and the abuse of process issues.

[37] On the basis of the foregoing, I do not conclude that the appellants, in the end, sought leave to appeal the immunity and abuse of process issues to the Divisional Court.

[38] Moreover, I am satisfied that the portion of the motion judge's order with respect to s. 38.1 that the appellants challenge and their abuse of process arguments are properly appealable to this court. As to s. 38.1, the appellants' challenge is directed only at the motion judge's interpretation of what acts are protected by s. 38.1. In this respect, the motion judge said the following, at para. 14:

> Inspections, investigations and assessments (carried out, in the main, by College officials appointed under the *IHFA*) are not listed actions in s. 38.1 and are therefore not accorded statutory immunity.

[39] This part of the motion judge's ruling finally determines the scope of the protection afforded by s. 38.1 for purposes of this action. If it stands, it would not be open to the appellants to later argue that s. 38.1 protects inspections, investigations and assessments in some circumstances. Thus, that part of the motion judge's ruling is final in nature.

[40] Similarly, with respect to the appellants' abuse of process arguments, the motion judge finally determined those issues for purposes of this action. At para. 20, he said "[t]he collateral attack doctrine does not apply". At para. 29, he said "[t]here is no abuse of process".

[41] The motion judge did not restrict his ruling regarding abuse of process to the preliminary stage of the proceedings at which he was hearing the motion. He did not leave any of the abuse of process arguments open for trial. In my view, the motion

judge's orders with respect to abuse of process were final in nature and, therefore, properly appealable to this court.

[42] In summary, I would not dismiss the appeals on the preliminary basis sought by Dr. Lipsitz.

Section 38.1

[43] The appellants argue that the motion judge erred in rejecting their submission that s. 38.1 of the *IHFA* provided them with a complete answer to Dr. Lipsitz's claims.

[44] Section 38.1 reads as follows:

> No Compensation
>
> 38.1 No compensation shall be payable by the Crown, the Minister, the Director or any other person engaged in the administration of this Act in respect of any loss suffered as a result of the Minister or Director refusing to issue or renew a licence, revoking or suspending a licence, imposing conditions or limitations on a licence, amending conditions or limitations on a licence or as a result of enforcing the prohibitions under s. 3. [Emphasis added.]

[45] The appellants raised their s. 38.1 argument as part of a motion to summarily dismiss Dr. Lipsitz's action pursuant to Rule 20.

[46] In dismissing the motion, the motion judge noted that s. 38.1 is specific about what losses will not be compensated: namely, any loss suffered as a result of the actions of the Minister or Director set out in the section. The motion judge stated that "if the claim for compensation is for losses sustained as the result of something other than one of the five actions listed [in s. 38.1], then… immunity is not available."

[47] However, the motion judge went on to say that "[i]nspections, investigations and assessments … are not listed actions in s. 38.1 and are therefore, not accorded statutory immunity."

[48] In the result, the motion judge held that the need to determine what part of Dr. Lipsitz's losses were the result of inspections, investigations and/or assessments and what part was the result of one of the five orders referred to in s. 38.1 raises a genuine issue for trial. He, therefore, dismissed the motion.

[49] The appellants argue that the motion judge erred in that part of his reasons where he said that inspections, investigations and assessments are not accorded statutory immunity. I agree that the impugned statement incorrectly narrows the scope of the protection afforded by s. 38.1. In my view, the section provides immunity for those conducting inspections, investigations and assessments to the extent that the losses for which compensation is claimed result from one of the actions specified in the section.

[50] The issue is one of statutory interpretation. The well accepted approach to interpreting a statute is that "the words of an *Act* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act* and the intention of Parliament": see, for example, *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 38. This approach typically involves courts considering the language of the provision in issue, the context in which the provision is found, and the purpose and scheme of the legislation.

[51] The language in s. 38.1 is straightforward. It can best be analyzed in two parts. The first relates to the entities or individuals to whom the section affords protection. The language is expansive. It applies to the Crown, the Minister, the Director and to anyone who is engaged in the administration of the *Act*. Significantly, I suggest, the section may include persons carrying out the activities mentioned by the motion judge, namely, "investigations, inspections or assessments". Thus, if investigators, inspectors or assessors are engaged in the administration of the *Act*, the first part of the requirement for immunity under s. 38.1 has been met.

[52] The second part of s. 38.1 sets out the types of losses which are shielded by the section. The effect of the second part is to limit the protection to only losses suffered as a result of the Minister or Director doing one of the actions specified in the section. These actions are regulatory orders and are central to the decision-making scheme of the *IHFA*. Thus, in general terms, s. 38.1 provides immunity for losses resulting from certain regulatory orders made under the *Act*.

[53] Thus, administrative actions such as investigations, inspections and assessments that lead to an order referred to in s. 38.1 are protected for losses resulting from the order. For example, if a Director refuses to issue a licence based on an inspection report, and damages ensue, not only does the Director have immunity for those damages, so does the inspector who prepared the report. There does, however, have to be a link between the inspector and the order expressly protected by s. 38.1.

[54] I note that s. 20(1) of the *IHFA* requires the Director to give notice to a licensee when he or she proposes to make some of the types of orders referred to in s. 38.1 in other than emergency situations. Under s. 20(1), the Director must give a licensee notice if the Director proposes to revoke, suspend or refuse to renew a licence. The section requires the Director to give reasons for the proposal. The licencee is entitled to appeal the Director's proposed decision to the HSARB.

[55] The proposal process is an integral part of the Director's decision-making process by which he or she may revoke, suspend or refuse to renew a licence. As such, I see no reason why the protection afforded by s. 38.1 should not be interpreted to include decisions of Directors made under s. 20(1).

[56] I see nothing in the context in which s. 38.1 is found or in the purpose of the section or the statutory scheme that suggests an interpretation other than the one that emerges from the ordinary meaning of the language in the section.

[57] In considering the context and statutory scheme, it is important to examine the other section in the *IHFA* that provides immunity to individuals and entities.

[58] Section 38(1) reads as follows:

> Immunity
>
> 38(1) Despite sections 5 and 23 of the *Proceedings Against the Crown Act*, no action or other proceeding for damages or otherwise shall be commenced against the Crown, the Minister, the Director, an inspector or assessor appointed under this Act or an officer, employee or agent of the Crown or of the College, the Registrar, the college, the council of the

> college or a committee established by the council or a member of the council or the committee for any act done or performed in good faith in the performance or intended performance of any duty or function or in the exercise or intended exercise of any power or authority under this Act or the regulations, or for any neglect, default or omission in the performance or exercise in good faith of any duty, function, power or authority under this Act or the regulations.

[59] In my view, s. 38(1) and 38.1 can be read harmoniously. Read together they create a logical scheme for providing immunity to individuals and entities carrying out functions under the *IHFA.*

[60] Section 38(1) is a type of umbrella clause. Unlike s. 38.1, the losses for which s. 38(1) provides immunity are not limited to losses suffered as a result of specific actions of the Minister or Director. Section 38(1) prohibits an action being taken against any of the named individuals and entities for damages resulting from an act or function carried out under the *Act.* In that respect, the immunity under s. 38(1) is broader than that provided by s. 38.1.

[61] However, the immunity provided by s. 38(1) is limited by a specific good faith requirement. Thus, acts or omissions are only protected under s. 38(1) if the person or entity acted in good faith.

[62] Section 38.1 provides immunity for a smaller category of losses than s. 38(1). Losses are included in the protection afforded by s. 38.1 only if they result from one of the actions specified in the section. The protection provided by s. 38.1, however, is not limited by a good faith requirement.

[63] Section 38(1) was part of the original *IHFA* enacted in 1989. Section 38.1 was added in 1996 as part of the *Savings and Restructuring Act*. It seems clear that in 1996, the Legislature intended to extend immunity to losses resulting from the regulatory decisions specified in s. 38.1 without the requirement of showing the actions resulting in those losses were done in good faith.

[64] While the types of actions that are shielded by s. 38.1 are not subject to a good faith requirement, they are subject to the checks that govern regulatory decisions. The processes that lead to the regulatory orders referred to in s. 38.1 are subject to the administrative law requirements of procedural fairness and the orders themselves are subject to a statutory right of appeal.

[65] Thus, in my view, s. 38.1 embodies a reasonable policy of providing immunity for losses resulting from the regulatory decisions specified in the section without a good faith requirement. The Legislature has sought to limit civil lawsuits that would, in effect, be a challenge to the regulatory decisions referred to in the section, thereby promoting the finality of the regulatory decisions.

[66] I turn now to the application of s. 38.1 to this case.

[67] The appellants fall within the group of people or entities that are afforded protection by s. 38.1. The appellants include the Crown, two Directors under the *Act*, the CPSO, and others who at the time of the events giving rise to the claim were engaged in

the administration of the *Act* in the sense that they were performing functions contemplated by the *IHFA*.

[68] The thrust of Dr. Lipsitz's claim is that the appellants engaged in a closure campaign to force him out of business. That campaign culminated in a series of Directors' orders or proposed orders that ultimately led him to either close or sell his sleep disorder centres at a significant loss. To the extent that the losses claimed by Dr. Lipsitz are found to have been losses "suffered as a result of" one or more of the Directors' orders or proposed orders then s. 38.1 would apply to preclude compensation for those losses.

[69] The question then becomes whether Dr. Lipsitz has made any claims which are not the result of Directors' orders or proposed orders covered by s. 38.1.

[70] As I see it, a significant amount of the losses for which Dr. Lipsitz seeks compensation come within the protection afforded by s. 38.1. However, I am not able to conclude that there are no claims for losses that fall outside the immunity provided by the section.

[71] In order to properly address the issue of what claims are protected, it will be necessary to make factual findings respecting what losses were the result of Directors' orders covered by the section and what, if any, losses were not.

[72] From the statement of claim, it appears that a large portion of the losses claimed by Dr. Lipsitz result from the regulatory orders covered by s. 38.1. However, some of the

alleged losses may result from actions other than those protected by s. 38.1. For example, in para. 39, Dr. Lipsitz alleges that the appellants caused harm to the plaintiffs (Dr. Lipsitz and his associated companies) by doing a number of different things. Two of those are:

- routinely engaging in false and unfairly critical reporting; and
- undertaking a campaign of harassment and intimidation through excessive and unreasonable investigations and assessments.

[73] In para. 7 of his affidavit, Dr. Lipsitz says: "… the repeated and unnecessary inspections imposed by the Defendants caused an unbearable financial strain on me and on the Corporate Plaintiffs."

[74] In paras. 46-54 of the statement of the claim, Dr. Lipsitz alleges that the Ministry implemented policy changes for the purpose of maliciously slowing the growth of his sleep business.

[75] A court will be required to make factual findings and determine if any of the claimed losses result from actions other than those protected by s. 38.1. In my view, those findings can only fairly be made at a trial in which the evidence can properly be assessed. In the result, I agree with the motion judge that there needs to be a trial of an issue to determine what claims, if any, fall outside s. 38.1.

[76] Finally, and very importantly, I note that even if some of the losses claimed are found to fall outside of the protection afforded by s. 38.1, those against whom the losses

are claimed will almost certainly be immune from action under s. 38(1) if their actions are found to have been done in good faith.

Abuse of Process

[77] Assuming some parts of Dr. Lipsitz's claims survive the immunities provided by s. 38.1 and s. 38(1), it becomes necessary to consider the appellants' argument that the motion judge erred in not dismissing or striking those claims as an abuse of process.

[78] In making the abuse of process argument, the appellants rely upon Rules 21.01(3)(d) and 25(11).

[79] The appellants' primary argument is that Dr. Lipsitz's action, at its core, is an attempt to re-litigate issues that were the subject of the regulatory decisions of the Directors and the orders of the HSARB dismissing Dr. Lipsitz's appeals. The HSARB's orders dismissing the appeals, which resulted from settlement agreements, finally determined the issues raised in the appeals. Those issues cannot be raised again in his subsequent civil action.

[80] The motion judge rejected the appellants' abuse of process argument. His reasoning was twofold:

1) Dr. Lipsitz's claim that the appellants had conducted a "closure campaign" was not apparent to Dr. Lipsitz until long after the appeals had been settled; and

2) In any event, Dr. Lipsitz's claim that the appellants engaged in a "closure campaign" could not have been adjudicated or remedied by the HSARB, essentially because the Board could not award damages.

[81] I would not interfere with the motion judge's conclusion that the action should not be dismissed or struck as an abuse of process. However, unlike the motion judge, I would not preclude the appellants from raising the abuse of process argument at trial.

[82] I agree with the motion judge that there needs to be a trial to determine whether the settlement agreements should operate to preclude Dr. Lipsitz from making the claims raised in his action. If Dr. Lipsitz establishes that there was a closure campaign and that he was unaware of it at the time he entered into the settlement agreements, then arguably the settlement agreements and the resulting dismissals of his appeals would not be a basis for barring his civil case.

[83] If on the other hand, a court were to find that the settlement agreements were not tainted as Dr. Lipsitz alleges, then, in my view, it would be open to a court to conclude that Dr. Lipsitz's civil claim or large parts of it are barred as an attempt to re-litigate issues that were decided or could have been decided in the regulatory process.

[84] There is a significant overlap between the issues that Dr. Lipsitz raised in his appeals and those in his civil action. For example, in each of his appeals, Dr. Lipsitz asserted that the Director had erred in issuing the orders under appeal because the Director had wrongly concluded that Dr. Lipsitz was not operating the sleep disorder

centres in accordance with appropriate standards and, in some instances, was operating the centres in a way that presented risks to the health and safety of persons. Dr. Lipsitz's position was that he had operated the centres at all times in accordance with appropriate standards and that there were no risks to health or safety.

[85] Dr. Lipsitz negotiated settlements of the appeals and the terms of the settlements permitted him to continue operating or to sell the centres involved. He agreed that the appeals be dismissed and the Board acted upon those agreements in dismissing his appeals.

[86] In the civil action, Dr. Lipsitz takes exactly the same position as he had taken in the appeals to the HSARB. He asserts that he operated all of the sleep disorder clinics in accordance with appropriate standards and did not create risks to health or safety.

[87] In my view, it would be open for a court in the civil action to determine that Dr. Lipsitz is precluded from re-litigating the factual issues of whether he operated the clinics in conformity with appropriate standards because those issues had already been resolved in the regulatory proceedings.

[88] Moreover, I do not consider the fact that the HSARB does not have jurisdiction to award damages to be dispositive of whether the regulatory proceedings can operate as a bar to the civil claim or parts of it. It may be open to a court to bar the re-litigation of factual issues if it concludes that those issues were finally determined or could have been determined in the regulatory proceedings in which Dr. Lipsitz participated.

[89] As part of the abuse of process argument, the appellants argue that the regulatory process under the *IHFA* was the exclusive forum for resolving the issues raised in the civil action. They also argue that Dr. Lipsitz's civil action is a collateral attack on the decisions of the Directors and the orders of the HSARB dismissing his appeal from those decisions.

[90] In my view, these arguments are best left for trial and can be addressed after the court has determined what parts of Dr. Lipsitz's civil claims are an attempt to re-litigate and what parts, if any, are not. With the benefit of that analysis, the court will be in a better position to determine whether there are other bases for applying the doctrine of abuse of process to bar Dr. Lipsitz's claim.

[91] In the result, I agree with the motion judge that Dr. Lipsitz's suit should not be stayed at this stage on the basis of abuse of process. However, unlike the motion judge, I would not finally determine the appellants' abuse of process arguments. For the reasons set out above, I am of the view that the appellant's abuse of process arguments should remain open at trial.

The Cross-Appeal

[92] Dr. Lipsitz asks this court to set aside that portion of the motion judge's order striking his allegations pertaining to the College's investigation of him under s. 75(a) of the *Health Professions Procedural Code*.

[93] Dr. Lipsitz pleaded that as part of the "closure campaign", the College appellants began investigations into Dr. Lipsitz's professional conduct, and those investigations were ultimately closed without any action being taken.

[94] In striking the allegations involving the College's investigations, the motion judge relied upon s. 36(3) of the *Regulated Health Professions Act, 1991* ("*RHPA*"), the relevant part of which provides that no report or document prepared for a proceeding under a health profession Act is admissible in a civil proceeding.

[95] Section 36(3) reads as follows:

> No record of a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, no report, document or other thing prepared for or statement given at such a proceeding and no order or decision made in such a proceeding is admissible in a civil proceeding other than a proceeding under this Act, a health profession Act or the *Drug and Pharmacies Regulation Act*, or a proceeding relating to any order under ss. 11.1 or 11.2 of the *Ontario Drug Benefits Act*.

[96] The investigations into Dr. Lipsitz were conducted pursuant to s. 75(a) of the *Health Professions Procedural Code*, which, in accordance with section 4 of the *RHPA*, is deemed to be part of each health profession act. The *Code* is also found in schedule 2 of the *RHPA*, and is thus clearly within the ambit of s. 36(3).

[97] Dr. Lipsitz makes three arguments why the motion judge erred.

[98] First, he says that s. 36(3) only applies to a s. 75(a) investigation when the investigation is initiated by an external complaint. It does not apply, he argues, when the

College initiates the investigation and no hearing results. Two of the s. 75(a) investigations conducted by the College with respect to Dr. Lipsitz were prompted by internal administrative decisions, not external complaints. None of the investigations resulted in a hearing.

[99] I do not accept this argument. In my view, it places an unduly narrow interpretation on s. 36(3).

[100] The language of s. 36(3) does not support the interpretation urged by Dr. Lipsitz. The relevant part of the section refers to documents "prepared for … a proceeding". That language does not distinguish between proceedings initiated by external complaints and those initiated by the College internally.

[101] Moreover, the narrow interpretation proposed by Dr. Lipsitz is not consistent with the purposes of the section. In *M.F. v. Sutherland* (2000), 188 D.L.R. (4th) 296 (Ont. C.A.), at paras. 29 and 31, Laskin J.A. explained the purpose of the section as follows:

> The purpose of s. 36(3) is to encourage the reporting of complaints of professional misconduct against members of a health profession, and to ensure that those complaints are fully investigated and fairly decided without any participant in the proceedings – a health professional, a patient, a complainant, a witness or College employee – fearing that a document prepared for College proceedings can be used in a civil action.
>
> …
>
> Section 36(3) is one of a number of legislative provisions whose broad objective is to keep College proceedings and civil proceedings separate. Section 36(1) provides for the

> confidentiality of information that comes to the knowledge of College employees; and s. 36(2) provides that College employees cannot be compelled to testify in civil proceedings about matters that come to their knowledge in the course of their duties.

[102] While Laskin J.A. referred to proceedings initiated by complaints, because that was the factual basis he was addressing, he points out that one of the rationales for the section is to ensure full and fair investigations without fear that documents prepared will be used in a civil action. The broad objective, as he put it, is "to keep College proceedings and civil proceedings separate".

[103] I agree with the motion judge that it makes no sense to interpret s. 36(3) so as to differentiate investigations prompted by external complaints from those triggered by the College itself. The objectives of ensuring full and fair investigations without fear that the documents will be used in a civil action and of keeping "College proceedings and civil proceedings separate" are applicable to all investigations whether initiated by an external complaint or by an internal decision of the College.

[104] Dr. Lipsitz's second argument is that the term "proceeding" used in s. 36(3) is limited to proceedings where there is a hearing. The investigations of Dr. Lipsitz did not result in hearings.

[105] Dr. Lipsitz argues that because a "proceeding" is not defined in the *RHPA*, the court should look to the definition of "proceeding" in the *Statutory Power Procedures Act*, R.S.O. 1990, c. S.22 ("*SPPA"*), in order to interpret s. 36(3). He argues that the

definition of proceeding in the *SPPA* limits the term "proceeding" to a process where there is a hearing.

[106] Again, I am of the view that the interpretation that Dr. Lipsitz urges results in an unduly narrow interpretation of the scope of s. 36(3).

[107] The definition of proceeding in the *SPPA* does not assist. Section 1(1) defines "proceeding" as "a proceeding to which the *Act* applies". Section 3(1) reads as follows:

> Application of Act
>
> 3.(1) Subject to subsection (2), this Act applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision.

[108] The definition in the *SPPA* is intended to set out which matters fall within the scope of the *SPPA*. Regulatory bodies falling within the *SPPA* have the powers conferred by it and are subject to its procedural requirements. The definition sections in the *SPPA* do not purport to define the word "proceeding" for purposes of interpreting other statutes.

[109] Section 36(3) of the *RHPA* expressly states that it applies to proceedings in specified Acts. Notably, s. 36(3) does not say that it applies only to proceedings to which the *SPPA* applies. Had the Legislature intended that S. 36(3) be so limited, it is reasonable to infer that it would have set out that intention expressly.

[110] Further, interpreting s. 36(3) of the *RHPA* as only applying to proceedings that result in the hearing could lead to undesirable results. For example, where an expert prepares a report in connection with a complaint or an investigation, the report would be admissible in a civil action if the College did not pursue the matter to a hearing, but not if there was a hearing. Similarly, a letter of complaint could form the basis of a civil suit by a doctor against the complainant if the College took no action on the complaint, but the same letter would be inadmissible if the complaint resulted in a hearing before the discipline committee.

[111] Such an interpretation could discourage peer assessors and expert witnesses from participating in the regulatory process, have a chilling effect on members of the public wishing to register complaints with the College.

[112] Dr. Lipsitz's third argument on the cross-appeal is that an action should not be struck on the basis of the inadmissibility of documents under s. 36(3) of the *RHPA* because such an order would interfere with the trial judge's discretion to decide evidentiary issues.

[113] In *M.F. v. Sutherland*, the court rejected a similar argument holding, at para. 40, that "if a paragraph in a party's pleading pleads facts that cannot be proved at trial or pleads documents that cannot be admitted at trial, that paragraph may be struck out on a motion". The court indicated that such a motion should be brought under Rule 25.11. The motion in this case was brought under that rule.

[114] Thus, I see no basis to interfere with the motion judge's decision to strike Dr. Lipsitz's allegations pertaining to the College's investigations of his professional conduct. I agree with the motion judge's comment at para. 34 of his endorsement where he said:

> I would simply add, for the plaintiff's benefit, that although the documentation is inadmissible, the fact that a complaint was made or that an investigative proceeding was commenced may be provable at trial.

[115] In the result, the cross-appeal is dismissed.

Disposition

[116] I would dismiss the appeals and the cross-appeal. In my view, the immunity issue and the abuse of process issues should remain open at trial.

[117] I would set aside the motion judge's costs order in favour of Dr. Lipsitz. I would leave the issue of costs of the motion to the trial judge. On my view of the appellants' arguments on immunity and abuse of process, Dr. Lipsitz's claims in the civil action will be significantly narrowed, if not disposed of entirely at trial on the basis of these arguments. The exercise at trial will be to determine what portion, if any, of his civil claim should survive. In those circumstances, I think it makes sense to reserve the costs of the motions below to the trial judge.

[118] I would make no award with respect to costs of the appeal. There has been mixed success. On the one hand, the appellants have succeeded in reducing their exposure because of the view I take of the immunity and abuse of process arguments. The

appellants were also successful in having Dr. Lipsitz's cross-appeal dismissed. On the other hand, I would not dismiss Dr. Lipsitz's action or strike his statement of claim as the appellants asked this court to do. In that respect, Dr. Lipsitz has realized some success.

RELEASED: "JUN 22 2011" "DOC"

"Dennis O'Connor A.C.J.O."
"I agree John I. Laskin J.A."
"I agree J.C. MacPherson J.A."